SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 15

JOSEPH MANDOLI, ALSO KNOWN AS GUISEPPE MENDOLIA,

Petitioner,

vs.

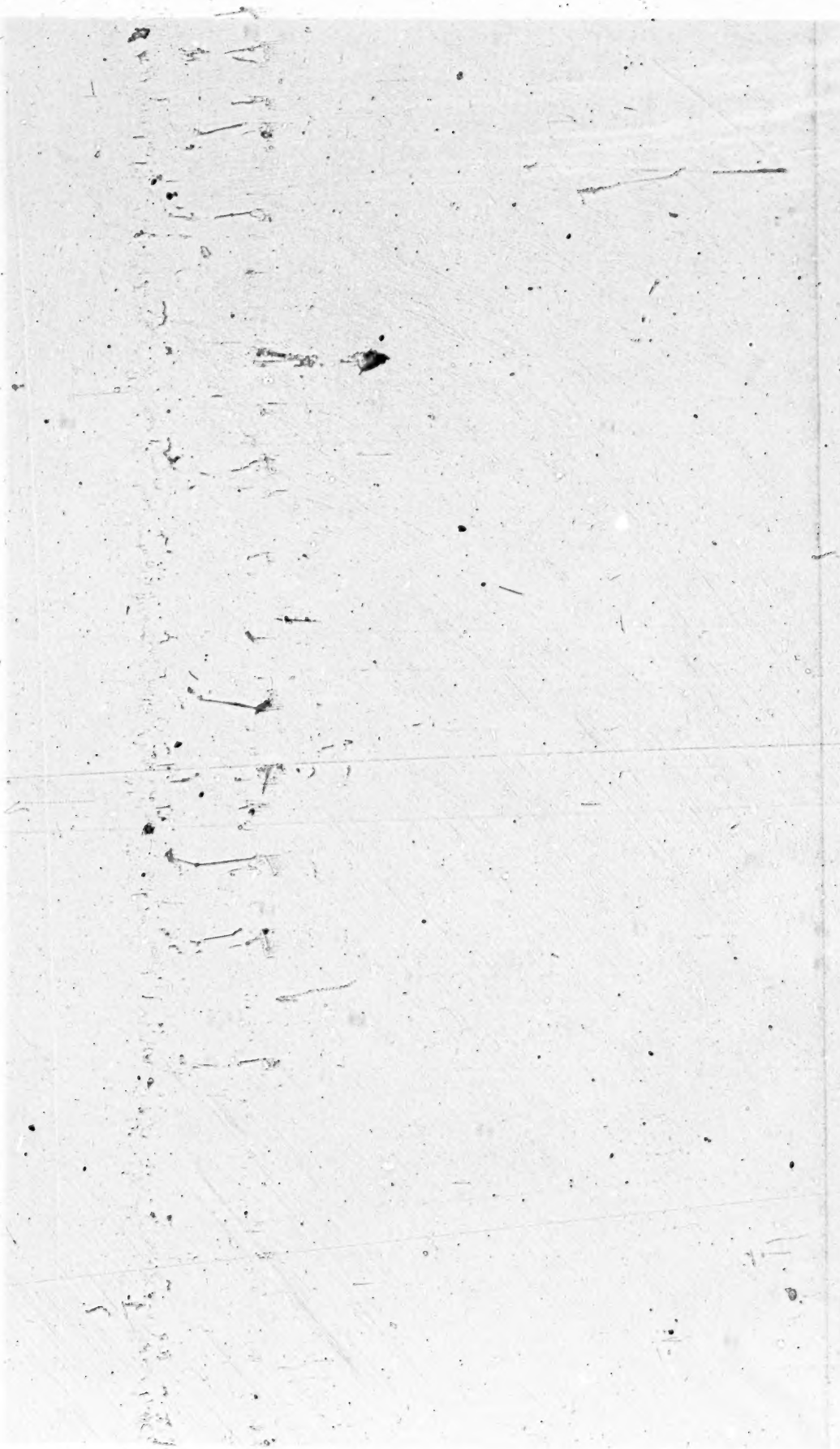
DEAN ACHESON, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

JACK WASSERMAN,
Warner Bldg.,
Washington, D. C.,
Attorney for Petitioner.

GASPARE CUSUMANO,
HARRY MEISEL,
ABRAHAM KUSHNER,
Of Counsel.



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Opinions Below

The Court of Appeals opinion is reported at 193 F. (2d) 920 and is set forth at page 31 of the record herein. The District Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1952. A petition for a writ of certiorari was

filed on February 19, 1952, and granted on June 9, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statement

Petitioner was born in Ohio on September 17, 1907. At the age of four months, his Italian parents took him to Italy where he resided until 1948 when he returned to the United States to prosecute this action (R. 22-23).

Under Italian law, as found by the District Court, petitioner was considered an Italian at birth, and as such he was subject to its military laws. The District Court likewise found that the petitioner was inducted into the Italian Army and served therein from April 14, 1931 until September 5, 1931 (R. 23). The Department of State refused to recognize the petitioner's claim to American citizenship in 1937, 1944, and in 1947 because he took an oath of allegiance to the King of Italy in connection with Italian military service which was forced upon him during the era of Mussolini (R. 6, 10, 28). This action was instituted for a declaratory judgment of citizenship to upset that ruling.

The only issue raised by the complaint and answer was whether the petitioner was expatriated upon the ground noted above (R. 41-43). Originally, the District Court found that the petitioner expatriated himself by reason of "joining the Italian Army by taking an oath of allegiance to the Italian Government which he was not coerced to take" (R. 18). The District Court, however, over objections, signed findings that expatriation resulted not only by taking an oath of allegiance to the King of Italy but also by reason of the failure of the petitioner to return to the United States after attaining his majority (R. 23).

After the appeal was filed in the Circuit Court, the Attorney General advised the Secretary of State that he was not warranted in expatriating American citizens who were in-

ducted into the Italian Army and required to take an oath of allegiance in connection with such military service (41 *Op. Atty. Gen.* No. 16). A copy of this opinion was filed with the Court of Appeals. On January 10, 1952, the Court of Appeals affirmed the decision of the District Court. It held that the statutory grounds of expatriation were not exclusive and that petitioner was obligated to return to the United States upon majority in order to retain his birthright. It ruled that it was unnecessary to "consider whether an oath of allegiance to the King of Italy, which appellant was obliged to take when he was drafted into the Italian Army, was in itself enough to expatriate him" (R. 33).

Questions Presented

1. There is no statute providing for the expatriation of native-born citizens by reason of prolonged residence abroad. For the past forty years, the Department of State and the Department of Justice have held that persons born in the United States, of dual nationality at birth, are free to reside abroad as long as they desire. In the absence of any statute, and in the light of this administrative practice, is a person born in the United States, and invested with Italian nationality as well as American citizenship at birth required to return to the United States within a reasonable time after attaining his majority in 1928 and is he expatriated by failing to return to the United States where he sought to do so in 1922, 1937, 1944 and 1947 but was refused passports by the American consul in Italy?

2. In the absence of statutory provisions, does a person born in the United States and invested with dual nationality at birth, elect and choose foreign nationality to the exclusion of American citizenship, solely by residing abroad after attaining his majority where such foreign residence had its inception during his childhood as a result of the actions of his parents?

3. Where a native born American citizen was required to serve in the Italian army during the days of Mussolini, was inducted into such army in 1931, and subscribed to an oath of allegiance to the King of Italy in connection with such military service, did such conduct result in expatriation or was it vitiated by duress?

Statute Involved

Section 2 of the Expatriation Act of March 2, 1907 (34 Stat. 1228; 8 U.S.C. 17) provides:

> "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

Historical Background

(A) Expatriation Prior to 1907

While a law for the acquisition of United States citizenship by naturalization was enacted as early as 1790, it was not until nearly a century later, in 1868 that the first expatriation statute was enacted (15 Stat. 223). Under the common law of England citizenship was considered immutable (*MacKenzie* v. *Hare*, 239 U. S. 299, 9 *Op. Atty. Gen.* 356). This common law principle resulted in conflicting claims to the allegiance of individuals who became naturalized under our laws. Foreign nations claimed that naturalized Americans continued to bear responsibilities and obligations to countries whose allegiance they had renounced. Whether an individual could expatriate himself, whether the doctrine set forth in the expression "*nemo potest exuere patriam*[1]" should prevail, was a subject of contro-

[1] This was shortened from "Nemo patriam in qua natus est exuere nec ligeantiae debitum ejurare possit". No man may abjure his native country nor the allegiance which he owes his sovereign. *Broom's Legal Maxims* (Tenth Ed.) p. 40; *Coke's Littleton*, 129 (a).

versy between the United States and Great Britain,[2] between Jefferson and Hamilton,[3] between members of Congress who debated the subject on the floor of the House of Representatives,[4] between the Federalists and the Anti-Federalist,[5] between Irish Americans and the governing authorities in Ireland, and between members of the judiciary in our various state courts.[6]

The Supreme Court in its decisions either avoided the issue of expatriation as in *Murray* v. *The Charming Betsy*, 2 Cranch 64 and *Santissima Trinidad*, 4 Cranch 209, 212 or acknowledged that expatriation might be accomplished only by mutual consent of the individual and his government (*Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. 99,125 and *Shanks* v. *Dupont*, 3 Pet. 242,246).

In *Talbot* v. *Jansen*, 3 Dall. 133, however, the Justice Patterson went so far as to hold that naturalization as a French citizen was not in itself evidence of a bona fide expatriation. In the course of his opinion he remarked:

> "A statute of the United States, relative to expatriation is much wanted; especially as the common law of England, is by the constitution of some of the states, expressly recognized and adopted. Besides ascertain-

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[2] The impressment of British born seamen who had become Americans, was one of the causes of the War of 1812. II *Richardson, Messages and Papers of the Presidents*, 485.

[3] *Tsiang, The Question of Expatriation in America Prior to 1907*, p. 28.

[4] 31 Annals of Congress, 15th Cong., 1st Sess. pp. 495, 1030-1094.

[5] *Tsiang, supra*, p. 50.

[6] "It is evident that the opinions of the courts were at variance. The right of voluntary expatriation which Alabama and Arkansas were inclined to oppose, was explicitly denied in Massachusetts, Connecticut, and New York. That right was, however, not only implicitly affirmed in North and South Carolina and Mississippi but also definitely recognized in Pennsylvania and Virginia and Kentucky by statutory provisions. Sectionally there was, therefore a correspondence of opinions between the courts and the congressmen who debated the question in 1817-1818." *Tsiang, supra*, pp. 69-70.

> ing by positive law the manner, in which expatriation may be effected, would obviate doubts, render the subject notorious, and furnish the rule of civil conduct on a very interesting point."

Circuit Judge Washington expressed a view in 1815 which had support among many legislators and judges. In the case of *United States v. Gillies;* 25 Fed. Cas. 1321 he said:

> "I must be more enlightened upon this subject than I have yet been, before I can admit, that a citizen of the United States can throw off his allegiance to his country, without some law authorizing him to do so."

Attempts to legislate upon the subject of expatriation were first made in 1794-1795 during the discussion of the naturalization bill of 1795. Effective resistance was manifested to any legislation upon the ground that Congress was not authorized to act upon the subject of expatriation (*Annals of Congress,* 3d Cong., 2d Sess. p. 1005, 1027-1030). Provision to permit express written renunciation of American citizenship was rejected two years later (*Annals of Congress,* 5th Cong. 1st Sess. pp. 349-354).

In 1808 a bill was introduced in Congress to withdraw citzenship from native born and naturalized citizens who resided abroad (*Annals of Congress,* 10th Cong. 1st Sess. p. 1871). In 1814 a resolution to inquire into the subject of expatriation met with no success (V *Abridgment of Debates of Congress,* 160-162). In 1817 and 1818 extensive debates were held upon a bill to permit written renunciation of American citizenship in open court followed by departure from the United States. Objections to the constitutionality of the measure and the feeling that if the constitution had intended to give Congress so delicate a power, it would have expressly granted it, resulted in the rejection of the

bill (*Annals of Congress*, 15th Cong. 1st Sess. pp. 495, 1030-1094, 1104-1106).

In 1859 Attorney General Black advised the President that: "Among writers on public law the preponderance in weight of authority, as well as the majority in numbers, concur with Cicero, who declares that the right of expatriation is the firmest foundation of human freedom and with Bynkershoek, who utterly denies that the territory of a State is the prison of her people" (9 *Op. Atty. Gen.* 356). And, nine years later, Congress again sought to enact this principle into statutory law.

The bill from which the Act of July 27, 1868 was evolved, originally had a provision for the expatriation of native born and naturalized citizens who established permanent residence abroad. *Cong. Globe*, 40th Cong. 2nd Sess., 783. Provisions were suggested for the expatriation of those who were naturalized or assumed public duties in foreign countries. *Cong. Globe, supra*, 968. As finally enacted, the measure merely proclaimed that expatriation was "a natural and inherent right of all people" 15 *Stat.* 223.

Congress, however, neglected to provide any legislative definition of the means by which expatriation could be accomplished. The State Department was accordingly "compelled to determine each case on its particular merits, with results by no means consistent" (*Tsiang, The Question of Expatriation in America Prior to 1907*, p. 103.) In *Comitis* v. *Parkerson*, 56 Fed. 556, 559 (1893), District Court Judge Billings declined to consider an American born woman married to an alien resident an expatriate, declaring that:

> "As to whether allegiance can be acquired or lost by any other means than statutory naturalization is left by Congress in precisely the same situation as it was before the passage of this act (of 1868). * * * So that, with reference to the question before the court, the law is left where it was previous to the year 1868

and Congress has made no law authorizing any implied renunciation of citizenship."

In the years that followed, the executive branch of the government constantly reminded Congress of the necessity of enacting statutory provisions governing the mode by which expatriation might be accomplished.

On December 1, 1873, President Grant declared in his annual message (VII *Richardson, Messages & Papers of the Presidents*, 239):

> "Until the year 1868 it was left embarrassed by conflicting opinions of courts and of jurists to determine how far the doctrine of perpetual allegiance derived from our former colonial relations with Great Britain was applicable to American citizens. Congress wisely swept these doubts away * * *. But Congress did not indicate in that statute, nor has it since done so, what acts are deemed to work expatriation. * * * I therefore commend the subject to the careful consideration of Congress * * *."

Again, in his annual message of December 7, 1874, President Grant repeated his request to Congress in these words (VII *Richardson, supra* 291):

> "I have again to call the attention of Congress to the unsatisfactory condition of existing laws with reference to expatriation and the election of nationality. Formerly, amid conflicting opinions and decisions, it was difficult to exactly determine how far the doctrine of perpetual allegiance was applicable to citizens of the United States. Congress by the Act of the 27th of July 1868, asserted the abstract right of expatriation as a fundamental principle of this Government. Notwithstanding such assertion, and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation, or when a citizen shall be deemed to have

renounced or to have lost his citizenship. The importance of such definition is obvious."

President Cleveland found occasion to voice his concern over the absence of statutory provisions for expatriation in his annual message of December 8, 1885 in these words (VIII *Richardson, supra,* p. 336):

> "While recognizing the right of expatriation, no statutory provision exists providing means for renouncing citizenship by an American citizen, native born or naturalized, nor for terminating and vacating an improper acquisition of citizenship."

When President Theodore Roosevelt assumed office, our laws were still silent as to what acts might constitute expatriation. On December 6, 1904, the executive branch renewed its request for legislation in these words (*Richardson, supra,* Supp. 2 by Lewis, p. 851):

> "Not only are the laws relating to naturalization now defective but those relating to citizenship of the United States ought also to be made the subject of scientific inquiry with a view to probable further legislation. By what acts expatriation may be assumed to have been accomplished, how long an American citizen may reside abroad and receive the protection of our passport * * * are questions of serious import, involving personal rights and often producing friction between this government and foreign governments. Yet upon these questions our laws are silent. I recommend that an examination be made into the subjects of citizenship, expatriation, and protection of Americans abroad, with a view to appropriate legislation."

Two years later, Congress finally responded to the insistent urgings of Presidents since the days of Grant and on April 13, 1906 enacted Senate Resolution No. 30 (59th Congress, 1st Session) providing for the appoint-

ment of a commission to inquire into the laws and practices regarding citizenship, expatriation and protection abroad. Later, a board consisting of State Department officials was substituted for the commission and its report of 538 pages was submitted to Congress on December 18, 1906. This report, designated as *House Document 326*, 59th Congress, 1st Session, became the basis for the Expatriation Act of March 2, 1907 (34 Stat. 1228; 8 U.S.C. 17). Recommendations were made that expatriation might be accomplished by foreign naturalization; by foreign government service and the taking of an oath of allegiance in connection therewith, and by becoming domiciled in a foreign state. Congress only adopted two of the suggested modes of expatriation, however, foreign naturalization and subscription to a foreign oath of allegiance. Provision was made in the 1907 Act for loss of citizenship by women who married aliens (*MacKenzie* v. *Hare*, 239 U.S. 299) and loss of protection by naturalized citizens who resided abroad. It was the latter provision which was the primary concern of the committee reports (*House Report 6431* and *Senate Report 7299;* 59th Congress, 2d Sess.) and of the short discussion upon the floor of Congress (41 *Con. Rec.* 1463-1467). The debates and the cases reveal that the provision with regard to naturalized citizens merely resulted in loss of protection rather than loss of citizenship by reason of foreign residence. *Carmardo* v. *Tillinghast*, 29 F. (2d) 527; *United States* v. *Gay*, 57 Ct. of Cl. 353, aff'd 264 U.S. 353; 28 *Op. Atty. Gen.* 504; 35 *Op. Atty. Gen.* 399; 39 *Op. Atty. Gen.* 411; 3 *Hackworth, Digest of International Law*, pp. 294-5. Under the 1907 Act, expatriation was limited to peace-time (8 U.S.C. 16, 17), and citizens born abroad were required to register and take an oath of allegiance in order to receive protection abroad by the United States (8 U.S.C. 6).

(B) Expatriation Under the 1907 Act

MacKenzie v. *Hare, supra,* sustained the power of Congress to enact the Expatriation Act of 1907. In response to suggestions of the courts and the entreaties of the executive branch of the government throughout the years, valid statutory provisions were enacted providing the means whereby citizenship might be revoked.

From 1907 to 1940 occasional opinions were rendered that the statute had not solved the uncertainty and confusion of the past and that there might be non-statutory methods of expatriation. Perhaps, the germ of this theory was carried by Congressman Lowden when he remarked on January 21, 1907 that: "The decisions are numerous that either a native-born American or a naturalized alien may by his own act voluntarily surrender his American citizenship". (41 *Cong. Rec.* 1467).

In *U. S. ex rel. Scimeca* v. *Husband,* 6 F. (2d) 957, (C.C.A. 2, 1925) the relator failed to establish that he was born in the United States and accordingly his exclusion as an alien without proper documents was upheld. In a *dicta,* the court remarked:

> "That the child born in New York in 1900 of Italian parents was regarded in Italy as an Italian subject is entirely plain. * * * Let it be admitted that mere residence in a country other than the United States has no effect upon a citizenship acquired by birth (*United States* v. *Howe,* D.C., 231 F. 546); yet whether one who (as appears in this case) was unable to speak the English language, who served in the Italian army and presumably swore allegiance to the land that claimed his services (*Ex parte Griffin,* D.C., 237 F. 445) and who, when he desired to go abroad, took out a passport as an Italian subject bound for Buenos Aires, had not, by his long series of acts, given uncontrovertible evidence of an intention to

remain an Italian subject, may very well be argued. We do not ground decision on this point."

In *U. S. ex rel. Rojak* v. *Marshall*, 34 F. (2d) 219 (D.C. W.D. Pa., 1929) it was held that the relator had expatriated himself under the 1907 Act by taking a foreign oath of allegiance. In addition the court was of the opinion that his foreign residence, military service and the fact that he had represented himself as a Czech citizen justified the conclusion that "the relator renounced his citizenship in the United States by becoming a citizen of Czechoslovakia". Relying upon the *dicta* in the *Scimeca* case, the court stated in a *dicta* of its own:

> "I do not think that Congress intended to limit expatriation to cases where a citizen has been naturalized or taken an oath of allegiance to a foreign state."

On the other hand, *Leong Kwai Lin* v. *United States*, 31 F. (2d) 738 (C.C.A. 9, 1929) reached a contrary conclusion. Lin was an applicant for admission to the United States as a citizen. He was a dual national at birth and had remained in China three years after reaching his majority. In upholding his American citizenship, the court said as follows with reference to the 1907 Act:

> "* * * it seems to us that this statute was enacted for the express purpose of removing any doubt on that subject and to prescribe the only means by which the expatriation of a native-born American citizen may be accomplished."

Perkins v. *Elg*, 307 U.S. 325 (1939) has been utilized by the court below to support the doctrine of non-statutory expatriation. The case arose by reason of the administrative ruling of the Attorney General in 1932 holding that naturalization conferred upon a minor, through foreign

naturalization of a parent, resulted in expatriation. 36 *Op. Atty. Gen.* 535. In conformity with that administrative ruling it was held by the Departments of State and Labor that Miss Elg, born in Brooklyn in 1907 and taken to Sweden in 1911 had lost her American citizenship during minority through her father's reacquisition of Swedish citizenship in 1922, Miss Elg returned to the United States within eight months after attaining her majority. In holding that Miss Elg remained a citizen of the United States, this court made the following observations:

1. "As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles." (307 U.S. 329).

2. "It has been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties.

* * * * * * *

That principle, while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice." (307 U.S. 329, 334).

3. The well recognized right of election was not de-

stroyed by our Treaty of 1869 with Sweden. "If the abrogation of that right had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroy by an ambiguity." (307 U.S. 337).

4. "Having regard to the plain purpose of Section 2 of the Act of 1907, to deal with voluntary expatriation, we are of the opinion that its provisions do not affect the right of election, which would otherwise exist, by reason of a wholly involuntary and merely derivative naturalization in another country during minority." (307 U.S. 347).

The *Elg Case* was hailed by the Assistant Legal Adviser to the State Department as one of the most significant citizenship cases ever rendered by the Supreme Court, but at the same time he criticized the court's assumption that the doctrine of election was well recognized either at common law or in international law, its reliance upon four State Department instructions relating to loss of protection rather than to citizenship, and its failure to set forth a test or standard as a guide for determining when the right of election must be exercised. *Sandifer, The Elg Case: Election of Citizenship at Majority by Minors,* 14 U. of Cinn. Law Rev. 423, 432-35, 441-2.

In the administration of the immigration laws after the *Elg Case* and prior to the effective date of the Nationality Act of 1940, no dual national was denied citizenship upon the ground of protracted residence abroad after majority. (Dept. of Justice File 19-3-77). Attorney General Jackson did express the view that the "statutes provide several different ways in which expatriation may be effected, but it does not necessarily follow that the methods thus prescribed are exclusive (*United States* v. *Marshall,* 34 F. (2) 219) although the contrary view is expressed in *Leong Kwai Lin* v. *United States,* 31 F. (2d) 738." 39 *Op.*

Atty. Gen. 411. But, when Secretary of State Hull requested a clarification of the *Elg Case*, and in particular advice whether protracted foreign residence after attaining majority by a dual national resulted in expatriation, the Attorney General declined to render an opinion in view of the fact that the Nationality Act of 1940 had just been enacted and he believed that the new legislation would clarify the entire problem. (Dept. of Justice File 19-3-77).

(C) Expatriation Under the 1940 Act

By Executive Order of April 25, 1933, the President designated the Secretary of State, the Attorney General, and the Secretary of Labor as a committee "to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to Congress." In 1938 a draft code was completed and submitted for enactment. (*Hearings before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong. 1st Sess. pp. 406, 407). The draft code was the subject of extensive hearings devoted in the main to discussions of the *Elg* case. (*Hearings, H. R. 6127, supra*, pp. 172, *et seq.*, 182-186, 191-200, 244-282.) During the hearings it was noted that provision requiring a dual national at birth to make an election at majority had been expressly deleted. Mr. Flournoy of the State Department stated:

> "In the code as first drafted we had a provision to take care of dual nationality cases. For instance, children of Italian parents in cases where the whole family moved back, the parents moved back to Italy and they would take the children with them. The children were then brought up in that country. Under the Italian law they are Italian nationals and under our law because they were born here they are Americans. In other words, there is a dual nationality."

> Under this original provision such persons would lose the American nationality if they lived in a foreign country for 2 years after they reached their majority.
>
> * * * * * * *
>
> Yes; after the provision was prepared the Department of Labor and Justice found some objection to that, and we could not reach an agreement, and in order to get on with the code we agreed to drop it. The State Department preferred to retain it, but it is not in this code as it now stands." (*Hearings, H. R. 6127, supra,* pp. 267-268.)

The Nationality Act of 1940 was enacted on October 14, 1940 and became effective on January 13, 1941 (54 Stat. 1174, 8 U. S. C. 1001). Foreign military service, civil service, voting, renunciation before a consul abroad and renunciation in the United States during wartime, treason, draft dodging, and residence abroad by naturalized citizens were added as grounds of expatriation. Minors *naturalized* abroad were required to return to the United States before their twenty-third birthday or within two years after the effective date of the Act (8 U. S. C. 801-a). The age of expatriation was lowered in some cases to eighteen (8 U. S. C. 803-b) and provision was made that loss of nationality under the act results "solely from the performance of the acts or fulfillment of conditions specified in this Act" (8 U. S. C. 808).

The court below, 193 F. (2d) 920, was of the opinion that there might be non-statutory methods of expatriation after 1907 and after the 1940 Act. A contrary opinion was expressed in *Tomasicchio* v. *Acheson,* 98 F. Supp. 166 and *Kawakita* v. *United States,* 190 F. (2d) 506. In the latter case, this Court did not undertake to resolve the question for the reason that it was not squarely presented (343 U. S. 731).

In the 77th Congress, 1st Session, an amendment was proposed to the Nationality Act of 1940 to permit dual nationals at birth to elect and renounce their foreign nationality in the United States upon attaining the age of 18 (*House Report 1469*). The proposal failed of enactment.

(D) Expatriation Under the Immigration and Nationality Act of 1952

In 1950, the Senate Immigration Committee commented upon the existing law as follows: (*Senate Report 1515*, 81st Congress 2d Sess., p. 768)

> "Dual Nationality at birth: The subcommittee feels that it is highly desirable that a person who acquired at birth the nationality of the United States and of a foreign state, and who is residing abroad in the foreign state of which he is also a national should succeed in divesting himself of such foreign nationality in order to preserve his United States citizenship. The subcommittee therefore recommends *a new provision* in the proposed bill providing that a person having dual nationality at birth shall lose his United States nationality by residing continuously for 3 years in the foreign state of which he is also a national by birth after he attain the age of 22 years, unless he shall prior to the expiration of such 3-year foreign residence, take an oath of allegiance to the United States and abjure any foreign allegiance before a United States diplomatic or consular officer, in the manner prescribed by the Secretary of State."

The new provision was incorporated into Section 350 of S. 2055 (82nd Cong. 1st Sess.) which provided for the expatriation of dual nationals at birth who resided in their country of foreign nationality for three years after the age of twenty-two without taking an oath of allegiance to the United States. Exception was also made for those who reside abroad after the age of sixty or for certain specified

purposes. As finally enacted in the Immigration and Nationality Act of 1952, effective December 24, 1952, the provisions of S. 2055 were accepted with the added limitation that expatriation be confined to dual nationals at birth who "voluntarily sought or claimed the benefits of nationality of any foreign state" (66 Stat. 269).

[In commenting upon this new provision of law, the President said: "Native born American citizens who are dual nationals would be subjected to loss of citizenship on grounds not applicable to other native-born citizens. This distinction is a slap at millions of Americans whose fathers were of alien birth" (*House Document 520,* 82nd Cong. 2d Sess. Compare the statement in *Hirabashyi* v. *United States,* 320 U. S. 81, 100 that distinctions "between citizens solely because of their ancestry are by their very nature odious to a free people").]

I

The Finding That Petitioner Was Expatriated by Failure to Return to the United States Was Erroneous

Petitioner submits that the ruling below was erroneous *first,* because the statutory methods of expatriation were exclusive; *secondly,* because prior to 1940 residence abroad did not result in expatriation for native born or naturalized citizens; *thirdly,* because the doctrine of election by dual nationals relates only to loss of protection; and *fourthly,* because dual nationals at birth are not required to make any election in order to retain American nationality.

1. The statutory modes of expatriation are exclusive

Our history, from the troubled days of Jefferson until 1907 bear witness to the fact that the Judiciary and Congress felt the need of statutory provisions setting forth the grounds of expatriation in place of the confusion and con-

flict which existed prior to our first expatriation statute. That history should leave no doubt, that after 1907, the statutory methods of expatriation were like the statutory provisions for denaturalization, "a self contained, exclusive procedure" (*Bindszyck* v. *Finucane*, 342 U. S. 83). No statute past or present, ever grounded expatriation upon foreign residence alone by a dual national. If expatriation may be founded upon a non-statutory basis, then we will be returned to the choas of our revolutionary days.

2. Prior to 1940, residence abroad did not result in expatriation

As noted in our historical survey of our expatriation laws *supra*, unsuccessful attempts were made in 1808, 1868, and 1907 to provide for the expatriation of native born citizens who established residence abroad. Prior to 1940 (8 U. S. C. 804) foreign residence did not even result in expatriation of naturalized citizens (*Carmardo* v. *Tillinghast*, *supra*; *Petro* v. *McGrath*, *infra*). In 1940 a provision for the expatriation of dual nationals who reside abroad was considered and rejected (*Hearings H. R. 6127*, *supra*, pp. 267-268). Not until December 24, 1952, will statutory provisions for the expatriation of dual nationals at birth become effective, and those provisions are limited to those who reside abroad for three years after reaching twenty-two, who claim the benefits of their foreign nationality and fail to take an oath of allegiance to the United States. Foreign residence alone will not expatriate dual nationals at birth.

The law as it existed prior to 1940 is expressed in *Petro* v. *McGrath*, 188 F. (2d) 978,979, where a dual national by naturalization returned to the United States in 1942. He was born in the United States in 1900 and was taken to Canada in 1910 where he resided until 1942. Justice Clark, speaking for the court, said:

> "As regards the long continued residence abroad, namely in Canada, that cannot be considered a ground for voluntary expatriation since no statute so provided until the Nationality Code of 1940, *supra*, was passed."

And the Nationality Act of 1940 (8 U.S.C. 801-a) only requires return to the United States within prescribed periods of time of those who are dual nationals by naturalization and is not applicable to those who, like petitioner, are dual nationals at birth.

In *Attorney General* v. *Ricketts*, 165 F. (2d) 193, the plaintiff was born in Oklahoma and during his minority he was taken to Canada where his father was naturalized. He did not return to the United States for permanent residence until he was thirty-four—long after his majority. The Circuit Court of Appeals for the Ninth Circuit held that he retained his American citizenship and did not elect Canadian citizenship by prolonged residence in Canada.

Repetto v. *Acheson*, 94 F. Supp. 623 (N. D. Calif., 1950) involved a native of the United States who was born in San Francisco in 1914 of Italian parents. In 1920, when she was six years of age she was taken to Italy where she remained until after 1947. The court held that, despite her prolonged residence in Italy after attaining her majority, she was nevertheless an American citizen.

In *Brown* v. *United States* (Ct. Cl. 571, 1869) the Court of Claims expressed the law as it existed prior to the Nationality Act of 1940 as follows:

> "We cannot accept the idea that the matter of domicile affects the fact of citizenship nor that a mere foreign residence of itself can work a forfeiture of political rights."

See also: *Tsiang, The Question of Expatriation in America Prior to 1907* (Johns Hopkins University Studies, 1942) p. 103.

3. The doctrine of election by dual nationals relates solely to loss of protection

Perkins v. *Elg, supra,* held "that the naturalization of a citizen's parents in a foreign country during the citizens minority does not divest the latter of his nationality by operation of law" (*Tomasicchio* v. *Acheson,* 98 F. Supp. at 170). It did however assume that four instructions of the Secretary of State, issued prior to the 1907 Act, supported the principle that citizenship might be retained or lost by the "well recognized right of election". However, as noted by Mr. Flournoy, former Assistant Legal Adviser to the State Department, "the decisions of the Department of State in cases involving election seem to relate generally to the right to protection rather than to nationality as a matter of strict law, for as the Department has repeatedly stated, the technical legal status of citizenship does not necessarily carry with it the right to protection. • • • In these cases the Department of State, as a rule, did not decide that the legal status of American citizenship was lost by an express or inferential election of the foreign nationality" (*Flournoy, Dual Nationality and Election,* 30 Yale Law Journal, pp. 545, 562-563).

There is neither an accepted common law principle, nor a doctrine of international law that election of citizenship by a dual national results in the loss of his native born nationality. *Flournoy, supra,* at 693, 706; *Sandifer, supra,* 14 U. of Cinn. Law Rev. at 442. Countries accepting the doctrine of election generally do so pursuant to statutory enactments and in some cases require affirmative action by its national to cut off native citizenship. (*Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality,* 29 Am. Journal of Int. Law, 248, 259-261.)

In 3 *Hackworth*, Digest of International Law, 370-371, the rulings of the Department of State are collected. On July 18, 1921 the Consul at Helsingfors (MS Department of State File 130 P 7574) was advised:

> "The Department of State has in numbers of instances in the past recognized the principle of election in cases of dual nationality, that is, in cases of persons born in the United States of alien parents or of persons born abroad of American parents. Such decisions have related to the right of protection, rather than to the strictly legal title of citizenship, since there is no statute of the United States providing that a person of the class mentioned loses his American citizenship by electing the nationality of the other country concerned."

4. Dual nationals at birth are not required to make any election in order to retain American nationality

We do not believe that the doctrine of election is a part of the common law of the United States. We submit, moreover, that *Tomasicchio* v. *Acheson, supra,* accurately concludes that dual nationals at birth are not required to make any election in order to retain American nationality. Nor, was any election required of *Kawakita,* who remained abroad after majority (343 U. S. 731).

The Court below misconstrued and misapplied *Perkins* v. *Elg,* 307 U. S. 325. Its complete failure to understand or appreciate the background of that case led to its statement that no reason existed "why one who, like appellant is born Italian as well as American should have less need to elect American citizenship when he becomes of age than one who is born American and *acquires* citizenship during minority." In *Perkins* v. *Elg,* foreign citizenship was acquired during minority by *naturalization.* Naturalization in a foreign state has been a statutory ground of expatriation since 1907. For many years, the Attorney General held

that foreign naturalization by a native-born American resulted in expatriation during minority (36 Op. Atty. Gen. 535). *Perkins* v. *Elg* held to the contrary, and permitted the native born American to cast-off the expatriating effect of foreign naturalization during minority by returning to the United States and thus electing American citizenship upon attaining majority. There is here involved no foreign naturalization which can have any expatriating consequences. And, the agencies charged with the administration of our citizenship laws, the State and Justice Departments, have uniformly held, that a dual national at birth may remain abroad indefinitely and need not make an election upon attaining majority.

In instructions issued by Secretary of State Charles E. Hughes on November 24, 1923 and set forth in the Department of State's "Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc., 1925", it is stated at page 121-122, with respect to dual nationals:

> "The statute does, however, make a distinction between the burden imposed upon the person born in the United States of foreign parents and the person born abroad of American parents. With respect to the latter, section 6 of the Act of March 2, 1907, lays down the requirement that, *as a condition to the protection of the United States,* the individual must, upon reaching the age of 18, record at an American consulate an intention to remain a citizen of the United States and must also take an oath of allegiance to the United States upon attaining his majority.
>
> *"The child born of foreign parents in the United States who spends his minority in the foreign country of his parents' nationality is not expressly required by any statute of the United States to make the same election as he approaches or attains his majority."* (Italics supplied.)

In 1922, it was held by the Mixed Claims Commission of the United States and Germany, that a native American citizen of British parentage did not under American law elect the nationality of his parents merely because he continued to reside, after attaining his majority, in England and in Canada where he was taken while he was a minor. The tribunal stated in *William Mackenzie, et al.* (United States *v.* Germany) agreement of Aug. 10, 1922, Mixed Claims Commission, Decisions and Opinions, 628-634; 3 *Hackworth, supra,* pp. 370-371:

> "The American law makes no provision for the election of nationality by an American national by birth possessing dual nationality."

In 1926, the Department of State reconsidered the entire subject of election of nationality by persons possessing dual nationality and concluded:

> ". . . that in the absence of legislative authority it was not warranted in declining to accord recognition as citizens of the United States to persons who were born in the United States of alien parents merely because they have resided abroad for protracted periods before and after attaining majority." (Department of State to Consul General at London, November 30, 1936, File 130, Vince, L. M.)

A person born in the United States of British parents executed an affidavit that she intended to reside permanently in Great Britain. The State Department held that she could only lose her American citizenship in accordance with Section 2 of the Act of March 2, 1907 (*Case of Anna Walklet,* File 130, October 4, 1927). *Louis de Bourcia* was born in the United States of French parents and desired to renounce his American citizenship, but was unable to do so because oaths of foreign allegiance were not known to French law. It was held that he could only renounce his

allegiance as provided in the existing Expatriation statute of March 2, 1907 (34 Stat. 1228). These cases are collected in 3 *Hackworth, supra,* at pages 373-374.

In *Matter of R.*, decided by the Board of Immigration Appeals in 1943 and reported in Volume I, I. & N. Decisions 389, it was held that the doctrine of election set forth in *Perkins* v. *Elg,* 307 U. S. 325, has no application to a person who is vested with dual nationality at birth. Mrs. R. was born in the United States of German parents in 1893 and taken to Germany three years later where she remained until 1942 when she sought admission to the United States as a citizen. In upholding her American citizenship, the Board stated:

> "We conclude, from the foregoing, that as late as 1923 and 1925 the Department of State was unwilling to insist that native-born citizens, such as Mrs. R. would lose their United States citizenship by failure to make an election after attaining majority. We further conclude that the State Department's pronouncements, in total, upon the doctrine of election, at least as applied to a native-born citizen, refer only to the right of the subject to diplomatic protection.
>
> "The courts have made statements on the doctrine of election, yet there is no case which holds that United States citizenship has been lost by the operation of the doctrine of election. Ludlam *v.* Ludlam, 26 N. Y. 356, State *v.* Jackson, 79 Vt. 504, and indeed, Perkins *v.* Elg, *supra,* either say or hold that United States citizenship is retained as a consequence of the exercise of the right of election.
>
> * * * * * * *
>
> It has not been recognized by the Immigration and Naturalization Service or by this Board that a native-born child having dual citizenship must elect between two citizenships upon attaining his majority; it has not been recognized by the courts; and the statements of authorities to this effect are subject to question in-

sofar as they are based upon State Department rulings which are determinative of the right of protection and not of citizenship as such.

* * * * * * *

"In Mrs. R's case there was no duty to elect. Therefore, since Mrs. R was vested with United States citizenship at her birth, she could lose it only in a method provided by the Act of March 2, 1907. There is no evidence that she has committed any such act, and she is, therefore, still a citizen of the United States and entitled to admission as such."

II

Petitioner May Not Be Deprived of Citizenship by Retroactive Reversal of Administrative Rulings

The administrative view permitting dual nationals at birth to remain abroad after majority, is entitled to great weight. *Billings* v. *Truesdell,* 321 U. S. 542, 552-3. But apart from such considerations, there is the inherent unfairness of applying a contrary rule. American citizenship should not be taken away arbitrarily.

Petitioner reached his majority in 1928. At that time, the State Department considered him a citizen and in no way attempted to advise the appellant, and other dual nationals at birth in Italy, that they were required to make an election, or return to the United States within a reasonable time. In 1928, no judicial opinions so held, or even intimated that a doctrine of election existed. Prior to attaining his majority, petitioner sought unsuccessfully in 1922 to secure a passport, which was refused because he was under age and had no one to accompany him. In 1937, a passport was refused to him because of his army service and again in 1944, he was refused registration as an American citizen (R. 10, 30). And, from 1941 to 1945, a state of

war existed in Italy, and the American consulates did not function there. *Repetto* v. *Acheson*, 94 F. Supp. 623, 625.

In a similar situation it has been held that expatriation does not occur. In *Uyeno* v. *Acheson*, 96 F. Supp. 510, District Judge Yankwich said:

> "The Government contends that the two year period (in 8 U. S. C. 801-a) has expired. This may be true. But within the two year period, the plaintiff did assert his American nationality by claiming the right to a passport, which would entitle him to return to the United States. The Government rejected this plea. It is continuing to block it by resisting this suit. . . . And the Government cannot in justice be allowed to claim that, because it has, *successfully* thus far, thwarted his efforts to gain recognition of his citizenship, the statute of limitations has run. Even if it be assumed that there were other means than the one chosen by the plaintiff—demand for a passport—to secure recognition of his citizenship, it may be assumed that the Government would have resisted those efforts as it is resisting the present one. . . . .
>
> "It is therefore not in a position to urge any delay which its own restraining action has induced as a bar to the relief here sought."

See also:

DiGirolamo v. *Acheson*, 101 F. Supp. 380 at 382.

In *Stockstrom* v. *Commissioner*, 190 F. (2d) 283, 289, it was said:

> "It has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to ordinary fair play from tax officials. We regard as unconscionable the Commissioner's claim of authority to assess a tax in 1948 because of Stockstrom's failure to file a return for 1938, when the Commissioner himself was responsible for that failure."

Equitable relief was likewise granted a taxpayer in *Staten Island Hygenia Ice and Cold Starage Co.* v. *United States*, 85 F. 2d 68, where a taxpayer was misled by the government.

In *Moser* v. *United States*, 341 U. S. 41, the court held that an alien was not barred from citizenship where he was misled by the government. The court said:

> "In fact, because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. *Johnson v. United States*, 318 U. S. 189, 197, 87 L. Ed. 704, 711, 63 S. Ct. 549. To hold otherwise would be to entrap petitioner."

To require the petitioner to have returned to the United States within a reasonable time after attaining his majority, by applying a retroactive rule of election to him in disregard of the administrative view at the time, and in the face of the fact that his departure to the United States was prevented by factors beyond his control, would result in the arbitrary loss of his American citizenship in contravention of the due process clause of the Constitution. *Mackenzie* v. *Hare*, 239 U. S. 299; *Repetto* v. *Acheson, supra.* It is therefore submitted, that on the grounds of fairness as well as judicial precedents which seek to embody doctrines of fairness, the petitioner did not lose his citizenship by residence abroad.

III

Petitioner Did Not Expatriate Himself by Taking a Foreign Oath of Allegiance

As noted by the Court of Appeals and admitted by the Government in the court below, petitioner was required by

Italian military law not only to serve in the Italian army but also to take an oath of allegiance in connection with such military service. Whether such conduct resulted in expatriation was the single issue raised by the State Department and the pleadings herein. That petitioner was not expatriated by taking an oath of allegiance in 1931 under legal compulsion should be obvious if expatriation is to continue as an expression of free choice. After the institution of suit herein the Attorney General ruled in 41 Op. Atty. Gen. No. 16 (May 8, 1951) as follows:

> "In my opinion, the choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all. Mr. Panzica's oath can only be regarded as having been taken under legal compulsion amounting to duress. See *Dos Reis ex rel. Camera* v. *Nichols*, 161 F. 2d 860 (C.A. 1st); *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2d)."

The Attorney General's opinion accurately describes the situation which pertains in the instant case as well as the principle which should control.

Conclusion

Petitioner was an American citizen at birth. Such American citizenship is presumed to continue until expatriation is established. *Hauenstein* v. *Lynham*, 100 U. S. 483. Expatriation provisions are penal in nature and should be strictly construed to preserve American citizenship. *In re Wildberger* 214 Fed. 508, 509. Expatriation should not be arbitrarily imposed *Mackenzie* v. *Hare*, 230 U. S. 299, and rights of citizenship should not be destroyed by an ambiguity *Perkins* v. *Elg*, 307 U. S. 325.

We submit, that neither the law nor the facts in the instant case, justify the conclusion that the petitioner has lost his precious birthright of American citizenship. It is

submitted that the court below erred in ruling that he was expatriated.

Respectfully submitted,

JACK WASSERMAN,
Attorney for Petitioner,
Warner Bldg.,
Washington 4, D. C.

GASPARE CUSUMANO,
HARRY MEISEL,
ABRAHAM KUSHNER,
Of Counsel.

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